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No. 88-1473 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

BOWLINE CONSTRUCTION COMPANY, RABON MARTIN, AND PAUL E. GARRISON,
Petitioners,

v.

CAPCO PIPE COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Has Oklahoma's statutory rule of denying interest on attorney fees taxed as costs deprived Petitioners of procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution?

II. Did the Oklahoma Supreme Court's denial of appeal-related attorney fees deprive Petitioners of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

All Petitioners and Respondent are named in the caption. All parties before the Oklahoma Supreme Court are before this Court.

RULE 28.1 STATEMENT

Respondent CAPCO Pipe Company, Inc. ("CAPCO") does not have any subsidiaries or affiliates. CAPCO is a wholly owned subsidiary of ASARCO Incorporated. ASARCO Incorporated does not have a parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are:

Alpha Metals of Japan Inc. (Japan)
Alta Mining and Development Company (Utah)
Asarco Australia Limited (Australia)
Blackhawk Mining and Developing Company, Limited (Idaho)
Blasbert Oberflaechentechnik GmbH (Solingen)
Brown Builders Inc. (Tennessee)
Cooper Basin Railway, Inc. (Delaware)
Corporacion Minera Nor Peru, S.A. (Peru)
Ebara-Udylite Co., Ltd. (Japan)
Electroplating Engineers of Japan Ltd. (Japan)
Electroplating Engineers of Taiwan Ltd.
Federated Genco Limited (Canada)
Friedrich Blasberg Svenska AB (Sweden)
Galvano Production Chemie GmbH (Solingen)
Geominerals, Ltd. (Bermuda)

Government Gulch Mining Company, Limited (Idaho)
Green Hill Mining Company (Nevada)
Hau-Mei Electroplating Technology Co. Ltd. (China)
L.P.W. Chemie GmbH (Neuss/BRD)
LAB Chrysotile Inc. (Canada)
Lesarco, Inc. (Philippines)
Liard River Mining Company Ltd. (N.P.L.) (Canada)
Mexico Desarrollo Industrial Minero, S.A. (Mexico)
Neptune Mining Company (Delaware)
Nihon LPW K.K. (Japan)
OMETEC, S.A. (Switzerland)
OMI Chemical Industries Pte. Ltd. (Singapore)
Southern Peru Copper Corporation (Delaware)
Wyoming Mining and Milling Company, Limited (Idaho)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... *i*

LIST OF PARTIES ..... *ii*

RULE 28.1 STATEMENT ..... *ii*

TABLE OF CONTENTS ..... *iv*

TABLE OF AUTHORITIES ..... *vi*

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

1. The underlying action 2
2. The first attorney-fee award, its appeal, and its reversal 3
3. The second attorney-fee award and its appeal 4
4. The request for and denial of appellate-related attorney fees 6

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING CERTIORARI 8

I. CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS EITHER PROPERLY RAISED IN THE STATE COURTS OR PROPERLY PRESERVED FOR REVIEW BY THIS COURT. 8

Page

A. The Standard for Granting Certiorari: A Properly Raised Substantial Federal Question Is a Jurisdictional Prerequisite. 8

B. Petitioners Have Not Properly Raised or Preserved Any Substantial Federal Question. 11

1. The equal protection challenge to the no-interest holding was not timely raised. 12

2. The procedural due process issue was not timely raised. 13

3. The constitutionality of denying appellate-related attorney fees was not properly preserved. 14

II. CERTIORARI SHOULD BE DENIED BECAUSE WITHHOLDING INTEREST ON AN AWARD OF ATTORNEY FEES TAXED AS COSTS ACCORDS WITH THIS COURT'S DECISIONS. 15

III. CERTIORARI SHOULD BE DENIED BECAUSE DENYING APPELLATE-RELATED ATTORNEY FEES IMPLICATES NO CONSTITUTIONAL CONCERNS. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 18 n.6

Amalgamated Food Employees Union v. Logan Valley Plaza,
391 U.S. 308 (1968) 10

American Surety Co. v. Baldwin,
287 U.S. 156 (1932) 11

Bailey v. Anderson,
326 U.S. 203 (1945) 9 n.4, 10

Beaty v. Richardson,
276 U.S. 599 (1928) 11

Beck v. Washington,
369 U.S. 541 (1962) 10

Bosworth v. Eason Oil Co.,
213 P.2d 548 (Okla. 1950) 20

Bredouw v. Wilson,
256 P.2d 421 (Okla. 1953) 11

Brown v. Massachusetts,
144 U.S. 573 (1892) 10

Callender v. Florida,
380 U.S. 519 (1965), 383 U.S. 270 (1966) 2

Cardinale v. Louisiana,
394 U.S. 437 (1969) 9

Page

Chenery v. Argi-Lines Corp.,
682 P.2d 640 (Idaho Ct. App. 1984) 20-21

Chicago, I. & L. Ry. v. McGuire,
196 U.S. 128 (1908).....9 n.4

Chicago Life Insurance Co. v. Cherry,
244 U.S. 25 (1916).....16, 21

City of Charlotte v. McNeeley,
190 S.E.2d 179 (N.C. 1972) 17 n.5

City of Tukwila v. Todd,
563 P.2d 223 (Wash. Ct. App. 1977) 17 n.5

Edelman v. California,
344 U.S. 357 (1953).....10

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983).....10

Faretta v. California,
422 U.S. 806 (1975)..... 2

Fox Film Corp. v. Muller,
296 U.S. 207 (1935).....19 n.7

Fuller v. Oregon,
417 U.S. 40 (1974).....9 n.4

Greene v. Circle Insurance Co.,
557 P.2d 422 (Okla. 1976) 11

Hall v. Cole,
412 U.S. 1 (1973).....18 n.6

Hanson v. Denckla,
357 U.S. 235 (1958).....11

Page

Herndon v. Georgia,
295 U.S. 441 (1935) 11

Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,
252 U.S. 341 (1920) 14

Hill v. California,
401 U.S. 797 (1971) 9

Hulbert v. Chicago,
202 U.S. 275 (1906) 10

Janes v. Busby,
93 S.W.2d 788 (Tex. Ct. App. 1936) 17 n.5

Jones v. O'Donnell,
290 N.W. 375 (Mich. 1940) 17 n.5

Klinger v. Missouri,
80 U.S. (13 Wall) 257 (1871) 19 n.7

In re Lamkin,
355 U.S. 59 (1957) 10

Library of Congress v. Shaw,
478 U.S. 310 (1986) 16

Life & Casualty Ins. Co. v. McCray,
291 U.S. 566 (1934) 17

McAlester Urban Renewal Authority v. Hamilton,
421 P.2d 823 (Okla. 1974) 15-16

McGlumphy v. Jetero Construction Co., Inc.,
593 P.2d 76 (Okla. 1978) 10

McGoldrick v. Compagnie Generale,
309 U.S. 430 (1940) 9

Page

McKeague v. Talbert,
658 P.2d 898 (Ha. Ct. App. 1983) 17 n.5

McManus v. Burrows,
177 S.W. 671 (Mo. Ct. App. 1915) 17 n.5

Missouri-Kansas-Texas R.R. v. Prince,
271 P. 253 (Okla. 1928) 10

Moen v. Norwest Bank of Minot,
647 F. Supp. 1333 (D.N.D. 1986) 20

National Educators Life Insurance Co. v. Apache Lanes, Inc.,
555 P.2d 600 (Okla. 1976) 16

New Orleans v. Dukes,
472 U.S. 297 (1976) 18

Northwest Datsun v. Oklahoma Motor Vehicle Commission,
736 P.2d 516 (Okla. 1987) 10

Overmyer v. Lawyers Title Insurance Corporation,
359 A.2d 260 (Md. Ct. App. 1976) 17 n.5

Pelican Production Corp. v. Mize,
573 P.2d 703 (Okla. 1977) 10

Pillow v. Board of Commissioners,
425 So.2d 1267 (La. Ct. App. 1982) 17 n.5

Radio Station WOW v. Johnson,
326 U.S. 120 (1945) 11

Riter-Conley Mfg., Co. v. Wryn,
174 P.280 (Okla. 1918) 17

Page

Sisney v. Smalley,
690 P.2d 1048 (Okla. 1984) 16

Stillwater Industrial Foundation, Inc. v. State ex rel. Board of Regents for Oklahoma A & M Colleges,
541 P.2d 173 (Okla. 1975) 11

Street v. New York,
394 U.S. 576 (1969) 9

Thomas v. Iowa,
209 U.S. 258 (1908) 14

Timmons v. Royal Globe Insurance Co.,
653 P.2d 907 (Okla. 1982) 11

Wheeler v. Benson-Taylor, Inc.,
394 P.2d 523 (Okla. 1964) 20

White River Lumber Co. v. Arkansas ex rel. Appelgate,
279 U.S. 692 (1929) 14

Whitney v. California,
274 U.S. 357 (1927) 14

Wolfe v. Madison National Bank,
352 A.2d 914 (Md. Ct. App. 1976) 17 n.5

STATUTES

28 U.S.C. § 1257 9

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1257(3) 2

Okla. Stat. tit. 12, § 727(A) 18

Page

SUPREME COURT RULES

Supreme Court Rule 21.1(h) 11, 12

Supreme Court Rule 28.1 ..... *ii*

TREATISES

R. Stern, E. Gressman, & S. Shapiro,
Supreme Court Practice (6th ed. 1986) 12

No. 88-1473

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CAPCO PIPE COMPANY, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent CAPCO Pipe Company, Inc. ("CAPCO"), asks this Court to deny the request of Petitioners Bowline Construction Company, Rabon Martin, and Paul E. Garrison (collectively, "Bowline" or "Petitioners") for a writ of certiorari to the Oklahoma Supreme Court.

OPINIONS BELOW

Oklahoma's intermediate Court of Appeals issued an unpublished memorandum opinion on April 19, 1988, which affirmed both the trial court's $346,000 award of attorney fees to Bowline and its attorneys (Messrs. Martin

and Garrison), and also the trial court's denial of interest on that award. App. C-1.[1] The Oklahoma Supreme Court denied certiorari on October 19, 1988. But the Oklahoma Supreme Court did not decide this case on the merits, so Petitioners have requested that a writ of certiorari be directed to the wrong court. *See Faretta v. California,* 422 U.S. 806, 812 (1975); *Callender v. Florida,* 380 U.S. 519 (1965), 383 U.S. 270 (1966).

JURISDICTION

This Court does not have jurisdiction in this case because Petitioners have not properly raised a substantial federal question before the Oklahoma state courts. *See* 28 U.S.C. § 1257(a).[2] This fatal jurisdictional defect is discussed below at pp. 8-15.

STATEMENT OF THE CASE

1. The underlying action. The $346,000 attorney-fee award arises in a suit for breach of warranty on sold goods. Petitioner Bowline sought recovery for defective labor and materials used in a water distribution system. Respondent CAPCO was one of several defendants.

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[1] Petitioners' Appendix is cited as "App._____."

[2] Petitioners incorrectly posit jurisdiction under the now repealed 28 U.S.C. § 1257(3).

The case was first tried in 1974. After 27 trial days, a mistrial was declared because Mr. Ray Bowline (Petitioner Bowline's chief executive officer) made improper contact with two jurors. Bowline then settled with all defendants except CAPCO.

Before the second trial began, Bowline sought a writ of mandamus from the Oklahoma Supreme Court compelling disqualification of the trial judge. The Oklahoma Supreme Court denied mandamus relief.

The second jury trial covered 35 days between November 17, 1980, and January 27, 1981. The jury awarded Bowline $325,000 and CAPCO received a $57,453 directed verdict on its counterclaim for unpaid open accounts.

The trial court ordered that Bowline accept a remittitur of $161,090. Bowline appealed. Oklahoma's intermediate Court of Appeals reinstated the full $325,000 verdict, upheld the trial judge's refusal to recuse himself, and affirmed the directed verdict on CAPCO's counterclaim. CAPCO paid this judgment.

2. The first attorney-fee award, its appeal, and its reversal. After the appeal was decided, the trial court on July 20, 1984 awarded Bowline $346,000 in attorney fees taxed as costs, with $146,000 allocable to Petitioner Rabon Martin and $200,000 allocable to Petitioner Paul E. Garrison. App. C-2. The total $346,000 fee award exceeded the jury verdict by $21,000.

Respondent CAPCO appealed the amount of the attorney-fee award, arguing that the fee was unreasonable

and not properly substantiated. App. C-2. CAPCO posted an appeal bond for the $346,000 awarded amount. Bowline objected on the basis that the bond did not provide for interest on the attorney-fee amount. The trial court held that under Oklahoma law an award of attorney fees taxed as costs does not bear interest.

Bowline appealed, assigning as error that the no-interest ruling "deprives a judgment creditor of *equal protection of the law,* as guaranteed by the Fourteenth Amendment to the United States Constitution." Petition in Error at 3 (filed September 13, 1984, in Oklahoma Appeal No. 63066) (emphasis added). This equal protection argument was not made to the trial court, but was raised for the first time on appeal and was briefed in Bowline's Brief in Chief at 25-27 (filed January 21, 1985) and Bowline's Reply Brief at 7-9 (filed March 19, 1985). *Bowline made no due process argument at any time during this appeal.*

Respondent CAPCO prevailed on the attorney-fee aspect of the appeal. The Oklahoma Court of Appeals reversed the trial court because that court's order "was void of the factors for the appellate court to ascertain whether the criteria used to compute the attorney's fees were reasonable and appropriate." App. C-2. The Court of Appeals did not address the question of interest on attorney fees.

3. The second attorney-fee award and its appeal. On remand, the trial court re-awarded $346,000 in attorney fees to Petitioners, just as before. Bowline again com-

plained that the bond did not provide for interest on the attorney fees taxed as costs. The trial court again refused to require a bond for interest, because Oklahoma law does not allow interest on attorney fees taxed as costs.[3] Bowline raised neither an equal protection challenge nor a due process challenge before the trial court.

CAPCO again appealed the merits of the fee award. And Bowline again appealed the interest issue, asserting verbatim the claim which Bowline had made on the first fee appeal: that the no-interest ruling "deprives a judgment creditor of equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution." App. B-3. The equal protection argument was raised, again, for the first time on appeal. *Bowline made no due process claim in its assignments of error.* App. B-3.

Bowline filed only one brief on the merits of its appeal on the interest issue. That brief raised *only an equal protection* challenge to the no-interest holding. Bowline argued that equal protection was denied because the applicable statute had been construed to create two classes of judgment creditors: (1) those who hold judgments for costs, and (2) those who hold other money judgments. Bowline's Brief in Chief at 46-48 (filed March 10, 1987). Through a May 11, 1987 letter to the Clerk of the Oklahoma Appellate Courts, Bowline waived its right to file a reply brief.

[3] The opinion of the Oklahoma Court of Appeals mistakenly states that the trial court awarded interest. App. C-4. It did not. This mistake is harmless, since the Oklahoma Court of Appeals ultimately held that Oklahoma law does not permit interest on attorney fees taxed as costs.

On April 19, 1988, the Oklahoma Court of Appeals issued an unpublished memorandum opinion which affirmed the amount of the fee award and which upheld the denial of interest on such award. App. C-1. The Oklahoma Court of Appeals held that controlling Oklahoma statutory and case law does not permit interest on attorney fees taxed as costs. App. C-4. The court did not decide the equal protection question.

Bowline sought rehearing. *For the first time during two appeals spanning five years,* Bowline argued that the no-interest holding violated due process. Bowline argued that procedural due process was denied by "establishing a system in which one litigant cannot lose, and the other litigant cannot win . . . ." Bowline's Petition for Rehearing at 5 (filed May 3, 1988). Rehearing was denied with no comment made on either the equal protection issue (raised for the first time on appeal) or the due process issue (raised for the first time on rehearing).

On July 1, 1988, Bowline sought certiorari in the Oklahoma Supreme Court and raised the due-process-unfair-system argument, App. D-5, as well as the equal protection argument. App. D-6. Certiorari was denied, again without comment on either the untimely equal protection issue or the belated due process issue.

4. The request for and denial of appellate-related attorney fees. After the Oklahoma Supreme Court denied certiorari, Bowline filed a motion for an award of appeal-related attorney fees. App. F-1. On November 18, 1988, the Oklahoma Supreme Court entered an order denying

Bowline's "motion for appeal-related counsel fees . . . ." App. G-1. *Bowline did not seek reconsideration and did not argue that the refusal to award appellate-related fees violated equal protection or due process.*

SUMMARY OF ARGUMENT

This Court should deny certiorari because Petitioners have not properly raised or preserved any substantial federal question. Petitioners' first question presented intimates that denying interest on attorney fees taxed as costs is unconstitutional. The *only* argument made in the body of the Petition for Certiorari is that denying interest violates procedural due process by creating an unfair system where one party cannot win and the other party cannot lose. *See* Petition for Certiorari at 4-5. This argument was not made to the trial court, was never assigned as error below, was never decided by the state appellate courts, and appears below only as a belated argument on rehearing.

The equal protection argument made below by Petitioners was not raised before the trial court. It was raised for the first time before the Oklahoma Court of Appeals. More importantly, Petitioners have waived such issue in this Court. The equal protection issue is not contained in the questions presented for this Court's review, and is not argued in the body of the Petition for Certiorari. *See* Petition for Certiorari at 4-5.

The second question presented by Petitioners suggests that the refusal to award appellate-related attorney fees

violates due process and equal protection. *See* Petition for Certiorari at 5-6. Petitioners had an opportunity to present this constitutional claim to the Oklahoma Supreme Court, but wholly failed to do so. After denial of appeal-related fees, Petitioners failed to exercise their opportunity to ask for reconsideration and to lodge their constitutional complaints.

Petitioners' own failures have deprived this Court of jurisdiction to consider any constitutional issue. This Court has long held that it has no jurisdiction to consider improperly raised or unpreserved constitutional questions.

Even if the issues were properly preserved, this Court should still deny certiorari review. Not only do the state-court decisions accord with this Court's decisions, but adequate and independent state grounds of decision exist which dispense with the need to consider any constitutional questions.

REASONS FOR DENYING CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS EITHER PROPERLY RAISED IN THE STATE COURTS OR PROPERLY PRESERVED FOR REVIEW BY THIS COURT.

A. The Standard for Granting Certiorari: A Properly Raised Substantial Federal Question Is a Jurisdictional Prerequisite.

Under 28 U.S.C. § 1257, it is an *absolute jurisdic-*

tional requirement that the asserted federal claim either be decided by the state court, or be explicitly and timely raised by the party if not decided by the state court. *Hill v. California,* 401 U.S. 797, 805 (1971); *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940). Exceptionally strong policy considerations underlie this jurisdictional requirement. First, the record is very likely to be inadequate on federal questions not raised in the state court. Second, in a federal system, it is important that state courts be given the first opportunity to consider the constitutionality of state statutes since the statutes may then be construed in a way which saves their constitutionality. Third, if the federal question is raised below, it might be decided by the state court on adequate and independent state grounds, thus rendering review by this Court unnecessary. *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

The rule in this Court is well settled. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to a want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576, 582 (1969).[4] This rule applies with equal force even where the parties address the constitutional issue in their state-court briefs after having failed to raise the constitutional issue as re-

[4] *See also Fuller v. Oregon,* 417 U.S. 40, 50 n.11 (1974); *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945); *Chicago, I. & L. Ry. v. McGuire,* 196 U.S. 128, 131-33 (1908).

quired by state procedure. *See Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983).

Thus, when required by state practice, the federal question must be raised before the trial court as a predicate to this Court's jurisdiction. Otherwise, certiorari must be denied. *See Edelman v. California,* 344 U.S. 357, 358 (1953) (failure to raise issue at trial); *Hulbert v. Chicago,* 202 U.S. 275, 279 (1906) (complete failure to raise question at trial court level); *Brown v. Massachusetts,* 144 U.S. 573, 580 (1892) (failure to raise question before verdict); *In re Lamkin,* 355 U.S. 59 (1957). Oklahoma law is clear that absent exceptional circumstances, the Oklahoma Supreme Court will not consider constitutional questions not presented to the trial court. *See, e.g., Northwest Datsun v. Oklahoma Motor Vehicle Commission,* 736 P.2d 516, 520 (Okla. 1987); *McGlumphy v. Jetero Construction Co., Inc.,* 593 P.2d 76, 83 (Okla. 1978); *Pelican Production Corp. v. Mize,* 573 P.2d 703, 704 (Okla. 1977); *Missouri-Kansas-Texas R.R. v. Prince,* 271 P. 253, 254 (Okla. 1928). Therefore, when the federal question is first raised in the state-court petition in error, the jurisdiction of this Court cannot attach. *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945).

The constitutional issue must not only be raised before the trial court, but must be properly raised according to state *appellate* procedures. Otherwise, the party will be deemed to have waived the federal issue and there is no basis for the assertion of this Court's jurisdiction. *Beck v. Washington,* 369 U.S. 541, 553 (1962); *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S.

308, 313 n.6 (1968); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Beaty v. Richardson,* 276 U.S. 599 (1928).

The Oklahoma Supreme Court will not review any allegation of error not contained in a party's petition in error. *See, e.g., Timmons v. Royal Globe Insurance Co.,* 653 P.2d 907, 912 (Okla. 1982); *Greene v. Circle Insurance Co.,* 557 P.2d 422, 423 (Okla. 1976); *Stillwater Industrial Foundation, Inc. v. State ex rel. Board of Regents for Oklahoma A & M Colleges,* 541 P.2d 173, 178 (Okla. 1975); *Bredouw v. Wilson,* 256 P.2d 421, 424 (Okla. 1953) (constitutional issue not presented in petition in error will not be decided even if raised in both parties' briefs).

Finally, this Court's jurisdiction may not be invoked by raising the federal question for the first time in a state-court rehearing petition, unless the state court actually entertains the petition and expressly decides the federal question. *See, e.g., Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932).

B. Petitioners Have Not Properly Raised or Preserved Any Substantial Federal Question.

Petitioners bear the heavy burden of demonstrating this Court's jurisdiction. Supreme Court Rule 21.1(h) requires the statement of the case to specify "the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought

to be reviewed were raised . . . .'' Thus, ''when the highest state court fails or refuses to pass expressly upon a federal question [then] the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation.'' R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice at 150 (6th ed. 1986).

In this case, the Oklahoma state courts never decided the constitutional issues. Thus, that ''high burden'' falls upon Petitioners to demonstrate that the issues were properly raised. Petitioners attempt to meet that burden in one short paragraph in their Petition for Certiorari. *See* Petition for Certiorari at 3. That short paragraph refers only to the assignment of error raised in the state-court Petition in Error. *See* App. B-3. As discussed above, that assignment of error raises only a now abandoned equal protection claim concerning failure to allow interest on the award of attorney fees. This meager effort to raise a federal question is too little and too late.

1. The equal protection challenge to the no-interest holding was not timely raised.

Petitioners have failed to show that the equal protection challenge was made before the trial court. Under Oklahoma procedure, an Oklahoma appellate court will not consider any constitutional question not presented to the trial court. *See supra* p. 10. Petitioners' failure to raise this issue ''in the court of first instance'' deprives this Court of jurisdiction. S. Ct. Rule 21.1(h).

Also, Petitioners have waived this argument in their Petition for Certiorari. The first question presented for review is ambiguous; it states only that the no-interest holding is "unconstitutional." Petition for Certiorari at i. Reference to Petitioners' argument on the first question presented demonstrates that "unconstitutional" refers only to a denial of procedural due process. Petition for Certiorari at 4-5.

2. The procedural due process issue was not timely raised.

Petitioners' first question presented deals with whether procedural due process is denied "by establishing an appellate format in which one litigant cannot lose, and the other cannot win." Petition for Certiorari at 4. Petitioners argue that this is the result of denying interest on attorney fees taxed as costs. This argument receives more treatment in the Petition for Certiorari than in all of Petitioners' briefs before the Oklahoma courts.

This argument was never raised before the trial court. The state-court Petition in Error contains nothing about a due process claim. Nor do Bowline's briefs on the merits ever address the due process issue. In fact, the due process issue was never raised until after the Oklahoma Court of Appeals had decided this case. *Not until rehearing* did Petitioners attempt to raise the due process argument. Even that argument was relegated to one typed paragraph on rehearing, compared to over one and one-half printed pages in the Petition for Certiorari here.

Under Oklahoma procedure, a constitutional issue

not raised before the trial court, and not assigned as error in the petition in error, will not be considered by an Oklahoma appellate court. Therefore, Petitioners have deprived this Court of jurisdiction over the asserted due process error.

3. The constitutionality of denying appellate-related attorney fees was not properly preserved.

Petitioners assert that the Oklahoma Supreme Court's failure to award appellate-related attorney fees violated due process and equal protection. *See* Petition for Certiorari at 5-6. It is too late to raise a federal question for the first time in papers before this Court. *See, e.g., White River Lumber Co. v. Arkansas ex rel. Appelgate,* 279 U.S. 692, 700 (1929); *Whitney v. California,* 274 U.S. 357, 362-63 (1927); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U.S. 341, 344 (1920); *Thomas v. Iowa,* 209 U.S. 258, 263 (1908).

After the Oklahoma Supreme Court denied certiorari in this case, Petitioners filed a motion for an award of appellate-related attorney fees. App. F-1. The Oklahoma Supreme Court denied that motion. App. G-1. Petitioners' motion did not raise the constitutional issue. App. F-1. After the motion was denied, Petitioners failed to request reconsideration based on the constitutional issues. Instead, Petitioners ignored settled procedures and attempted to raise the issue for the first time in this Court. Thus, the constitutional issue was not presented to the state court and was not decided by the state court. Nor was the constitutional issue "evaded" by the state court. The Oklahoma

court was simply never given the opportunity (mandated by this Court) to consider that issue. Therefore, Petitioners have failed to preserve a constitutional issue for this Court's jurisdiction.

This case is wholly inappropriate for certiorari review by this Court. Petitioners' constitutional claims—on the merits weak at best as shown in Arguments II and III *infra*—were not properly preserved for this Court's review. Because they were not presented below, this Court has no adequate record to review the questions. Because they were not presented below, the state courts were not given an opportunity to construe the state law in a manner which saves its constitutionality. Because they were not presented below, the state courts were not given an opportunity to discuss how adequate and independent state grounds render decision on those constitutional questions unnecessary. Properly raising the asserted federal questions is a jurisdictional mandate. Petitioners have failed to raise the constitutional questions properly. This Court therefore lacks jurisdiction to issue any writ of certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE WITHHOLDING INTEREST ON AN AWARD OF ATTORNEY FEES TAXED AS COSTS ACCORDS WITH THIS COURT'S DECISIONS.

Petitioners' base complaint is a feeling that the Oklahoma Supreme Court has misinterpreted Oklahoma statutes regarding allowance of interest. *See* Petition for Certiorari at 4. Oklahoma law is well settled that interest is not allowed on attorney fees taxed as costs. *See McAlester*

Urban Renewal Authority v. Hamilton, 421 P.2d 823, 825-26 (Okla. 1974); *National Educators Life Insurance Co. v. Apache Lanes, Inc.,* 555 P.2d 600, 602 (Okla. 1976) (declining to overrule *McAlester*). Questions of state law interpretation fall exclusively within the province of state courts. Even if this Court disagrees with the resolution of a state law issue, it has no jurisdiction to change that resolution.

> It has been stated that when a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights.

Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 30 (1916).

Thus, Petitioners' claim must wholly fail unless they can demonstrate that the decision below was "impossible in a rational administration of justice . . . ." *Id.* This Court's own holdings demonstrate that interest may be disallowed on an award of attorney fees. For example, in *Library of Congress v. Shaw,* 478 U.S. 310 (1986), this Court reaffirmed its "repeated holdings that interest [on awards of attorney fees] may not be awarded against the government in the absence of express statutory or contractual consent." *Id.* at 314. This rule is deeply rooted in the common law which denied interest unless an agreement to the contrary existed. *See id.* at 314-15; *Sisney v. Smalley,* 690 P.2d 1048, 1050 (Okla. 1984). It is almost frivolous to

suggest that a rule so deeply rooted in the common law is "impossible in a rational administration of justice."[5]

This Court's decisions amply show that it is permissible to deny interest on an award of attorney fees. This Court has long held that taxing attorney fees as costs on some obligations but not on others triggers no equal protection violation, despite the creation of "have" and "have not" classifications of judgment debts. *See, e.g., Life & Casualty Ins. Co. v. McCray,* 291 U.S. 566, 569-70 (1934). *See also Riter-Conley Mfg., Co. v. Wryn,* 174 P. 280, 283, 284-85 (Okla. 1918). If the disparate treatment of judgment debts (costs) themselves does not violate equal protection, then neither can there be any constitutional infirmity in the disparate treatment of *interest* on judgment debts.

Nor is there any due process violation here. Legislative enactments enjoy a presumption of validity and rationality. *See Life & Casualty Ins. Co.,* 291 U.S. at 572. The burden is upon Petitioners to show a lack of even minimum rationality for disallowing interest on the "costs"

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[5] In fact, the seemingly unanimous and well-settled rule in the United States has been that interest is not allowed on awards of costs or attorney fees unless explicitly allowed by statute. *See, e.g., McKeague v. Talbert,* 658 P.2d 898, 908 (Ha. Ct. App. 1983); *Pillow v. Board of Commissioners,* 425 So.2d 1267, 1284 (La. Ct. App. 1982); *Overmyer v. Lawyers Title Insurance Corporation,* 359 A.2d 260, 268 (Md. Ct. App. 1976); *Wolfe v. Madison National Bank,* 352 A.2d 914, 918 (Md. Ct. App. 1976); *City of Tukwila v. Todd,* 563 P.2d 223, 227 (Wash. Ct. App. 1977); *City of Charlotte v. McNeeley,* 190 S.E.2d 179, 188 (N.C. 1972); *Janes v. Busby,* 93 S.W.2d 788, 918 (Tex. Ct. App. 1936); *Jones v. O'Donnell,* 290 N.W. 375 (Mich. 1940); *McManus v. Burrows,* 177 S.W. 671 (Mo. Ct. App. 1915).

portion of a judgment. *See generally New Orleans v. Dukes,* 472 U.S. 297, 303 (1976).

A reasonable state legislature could rationally adopt a policy goal of requiring all citizens to finance their own litigation. The by-product of such a policy would be the denial of interest altogether while the debt was being challenged during appeal. Since a reasonable legislature could have denied all interest on the entire judgment, as at common law, a legislature is being no less rational by denying interest to a portion less than the whole of the judgment (*e.g.*, costs).[6]

The Oklahoma Legislature has apparently adopted precisely such a rational policy. It follows that nothing about Okla. Stat. tit. 12, § 727(A) (Supp. 1988) or any other pertinent Oklahoma statute suffers from any constitutional infirmity, whether equal protection, due process, or otherwise.

III. CERTIORARI SHOULD BE DENIED BECAUSE DENYING APPELLATE-RELATED ATTORNEY FEES IMPLICATES NO CONSTITUTIONAL CONCERNS.

Petitioners' second question presented concerns the

[6] In fact, a reasonable legislature could go so far as to *entirely deny* a recovery of attorney fees. The "American rule" is to deny attorney fees to a prevailing party absent a statute or contract explicitly allowing fees. The American rule is firmly embedded in this Court's jurisprudence. *See generally Hall v. Cole,* 412 U.S. 1 (1973); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975). Petitioners' meritless argument necessarily suggests that this Court has acted *ir*rationally in repeatedly affirming the American rule.

state court's denial of appellate-related attorney fees. Petitioners argue that since they "prevailed" on appeal, they are entitled to attorney fees on appeal under state law. The Oklahoma Supreme Court decided this question of state law against Petitioners, so Petitioners now attempt to make a constitutional question out of that state-law decision.

Petitioners' allegations present no substantial federal question. First, this issue may be resolved wholly on the basis of state law.[7] Petitioners claim to be prevailing parties on appeal, but they neglect to tell this Court the whole story. Since the 1981 jury verdict, this case has seen three state-court appeals: one appeal concerning the jury verdict itself and two appeals on the dual questions of attorney-fee amount and interest. Following the jury verdict, both Petitioner Bowline and Respondent CAPCO filed appeals. Bowline successfully defended its jury verdict; CAPCO successfully defended its directed verdict; and CAPCO also successfully defended the trial judge's refusal to recuse himself. *See supra* p. 3. Thus, in appeal round one, Respondent CAPCO prevailed on two-thirds of the issues presented to the state court.

In appeal round two, Bowline appealed the trial court's denial of interest on the attorney-fee award, and

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[7] This Court has long held that if the decision below rests upon adequate and independent state grounds, the Court will not assume jurisdiction because federal jurisdiction fails. *See, e.g., Klinger v. Missouri,* 80 U.S.(13 Wall) 257, 263 (1871); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935).

Respondent CAPCO appealed the $346,000 amount of the fee award. The Oklahoma Court of Appeals did not address the interest issue, but reversed the amount of the fee award and agreed with CAPCO that the trial court had failed to require adequate substantiation of the fee amount. *See supra* p. 4. Thus, on the second round of appeal, Respondent CAPCO won completely.

During appeal round three, Respondent CAPCO again appealed the amount of the attorney-fee award, and Petitioner Bowline again appealed the trial court's denial of interest on the fee amount. Neither party prevailed in their own appeal. The Court of Appeals upheld the amount of the fee award and denied interest on the awarded amount. Thus, in the third round of appeal, each party prevailed in the other party's appeal.

The state court's refusal to award appellate-related fees to Petitioners is manifestly justified on state-law grounds. Petitioners simply cannot be deemed prevailing parties throughout the entire course of the appeal process. Instead, each party prevailed on some issues, lost on other issues, and on balance were equally successful.

When taxing costs, a court must always be guided by equity. *See, e.g., Wheeler v. Benson-Taylor, Inc.*, 394 P.2d 523, 528 (Okla. 1964); *Bosworth v. Eason Oil Co.*, 213 P.2d 548, 556 (Okla. 1950). Thus, as a matter of equity and judicial discretion, there is no single prevailing party whenever each party prevails on different issues. *See, e.g., Moen v. Norwest Bank of Minot*, 647 F. Supp. 1333, 1344 (D.N.D. 1986); *Chenery v. Argi-Lines Corp.*, 682 P.2d

640, 645 (Idaho Ct. App. 1984).

The simple presence of a prevailing-party issue shows that the action of the state court was not "arbitrary and capricious" as claimed by Petitioners. This very presence also shows a rational distinction between allowing appeal-related attorney fees in some cases, while disallowing such fees in others. In short, the case here involves merely a question of state law and a question of appellate fact: Was the "winning" party qualitatively successful enough to be labeled as a "prevailing" party? This question and the Oklahoma Supreme Court's "no" answer show a rational basis for denying appeal-related attorney fees here. This inquiry also demonstrates that the result below was "not so gross as to be impossible in a rational administration of justice," but instead was firmly grounded in rationality. *See Chicago Life Insurance Co. v. Cherry,* 244 U.S. 25, 30 (1916).

CONCLUSION

Petitioners have not shown a single reason for grant of certiorari here. This case does not present a question of first impression; this case does not involve a lower court decision that conflicts with decisions of this Court; and this case does not involve a decision conflicting with the decisions of other lower courts. No substantial federal question whatsoever has been presented for review. And even the issues which Petitioners seek to dress in constitutional clothing were not properly preserved for this Court's review. Those issues were never raised in the court of first instance, the trial court. The only issue assigned as

error on appeal has now been waived. All other constitutional issues appearing in the Petition for Certiorari were raised for the first time on appeal, either on rehearing after the Oklahoma Court of Appeals had decided this case, or in the Petition for Certiorari to this Court.

This Court should not further burden its docket with Petitioners' meritless plea.

Respectfully submitted,

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